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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 -----x

In re:

03 MDL 1570 (GBD) (FM)

4 TERRORIST ATTACKS ON SEPTEMBER
5 11, 2001,
6 -----x

New York, N.Y.
April 16, 2013
12:00 p.m.

Before:

HON. FRANK MAAS,

Magistrate Judge

APPEARANCES

10 KREINDLER & KREINDLER
11 Attorney for Plaintiff
12 JAMES KREINDLER, ESQ.

13 COZEN O'CONNOR
14 Attorneys for Federal Insurance Plaintiffs
SEAN P. CARTER, ESQ.
J. SCOTT TARBUTTON, ESQ.

15 MOTLEY RICE
16 Attorney for Burnett and Eurobroker Plaintiffs
ROBERT T. HAEFELE, ESQ.

17 ANDERSON KILL & OLLICK, P.C.
18 Attorneys for O'Neill and Plaintiffs Executive Committee
JERRY S. GOLDMAN, ESQ.

19 BERNABEI AND WACHTEL
20 Attorneys for Defendants
ALAN KABAT, ESQ.

21 CLIFFORD CHANCE
22 Attorneys for Dubai Islamic Bank
STEVE COTTREAU, ESQ.
RONI BERGOFFEN, ESQ.

23 OMAR T. MOHAMMEDI, ESQ.
24 Attorney for Wamy International

25 MARTIN F. McMAHON, ESQ.
Attorney for Rabita Trust

D4GFTERA

1 (Case called)

2 (In open court)

3 THE COURT: This is a conference on In Re: Terrorist
4 Attacks on September 11, 2001. Counsel, state your appearances
5 for the record.6 MR. KREINDLER: Good morning, your Honor. James
7 Kreindler from Kreindler & Kreindler.8 MR. CARTER: Good morning, your Honor. Sean Carter
9 from Cozen O'Connor.10 MR. HAEFELE: Good morning, your Honor. Robert
11 Haefele from Motley Rice.12 MR. GOLDMAN: Good morning. Jerry Goldman for the
13 O'Neill plaintiffs and plaintiffs executive committee.14 MR. TARBUTTON: Good afternoon, your Honor. Scott
15 Tarbutton, Cozen O'Connor.16 MR. KABAT: Good afternoon, your Honor. Alan Kabat
17 from Bernabei and Wachtel.18 MR. COTTREAU: Good afternoon, your Honor. Steve
19 Cottreau from Clifford Chance on behalf of Dubai Islamic Bank.20 MS. BERGOFFEN: Good afternoon, your Honor. Ronnie
21 Bergoffen on behalf of Dubai Islamic Bank from Clifford Chance.22 MR. MOHAMMEDI: Good morning, your Honor. Omar
23 Mohammedi on behalf of Wamy International.24 MR. McMAHON: Good morning, your Honor. Martin
25 McMahon on behalf of Rabita Trust.

D4GFTERA

1 THE COURT: Good morning. Hiding in the back.

2 MR. McMAHON: I'm trying to avoid you, your Honor.

3 THE COURT: Before we get started on the agenda, Judge
4 Daniels referred to me the case of John Doe v. Bin Laden which
5 is brought by Judicial Watch Incorporated. It was filed in
6 2009 apparently in the District of Columbia and I guess just
7 recently found its way here. Is that a case you folks are
8 familiar with?

9 MR. CARTER: Your Honor, it is it's a suit filed
10 against Afghanistan and Osama bin Laden on behalf of as I
11 understand it a family member of one victim of the attacks. It
12 went up to the circuit previously and the circuit remanded the
13 case for discovery related to subject matter jurisdiction under
14 the Foreign Sovereign Immunities Act. The counsel for the
15 plaintiffs in that case, Jim Peterson from Judicial Watch, had
16 contacted us in advance of the timing for the agenda letters
17 for Judge Daniels and asked that we simply request that some
18 discovery schedule be set. And that is what resulted in being
19 in front of your Honor. I do not believe that either counsel
20 for the plaintiff or counsel for Afghanistan is present today.

21 THE COURT: So we'll leave that for another day. Is
22 that what you propose?

23 MR. CARTER: I think that's correct your Honor.

24 On a somewhat related note, as several of us were
25 walking here this morning the Second Circuit issued three

D4GFTERA

1 decisions on the appeals that had been argued in December.
2 Frankly, we really haven't had a chance to even survey them
3 yet. As I understand it 11 or 12 defendants had been remanded
4 to the district court for jurisdictional discovery, so in the
5 hallway outside we spoke to our colleagues on the defense side
6 and suggested that it might make sense for us all to take stock
7 of the decision and come back in May and discuss with your
8 Honor a comprehensive discovery schedule going forward.

9 THE COURT: That certainly makes sense. Are there
10 defendants who have been remanded for merits discovery who are
11 potential deep pockets in the case, if I could put it that way?

12 MR. CARTER: Your Honor, my understanding is that the
13 banking defendants that had been dismissed on 12(b)(6), their
14 dismissals are affirmed. There's at least one corporate
15 defendant that's been remanded for jurisdictional discovery as
16 well as a relatively insignificant defendant also as well as a
17 number of the other defendants, as I understand it, again, I
18 haven't read the decision, are officials of certain of the
19 charities that are presently before the Court for discovery.

20 MR. KABAT: I can confirm there is no merit discovery.
21 There is jurisdictional discovery. The circuit limited
22 jurisdictional discovery, specifically 27 and 28 of their
23 opinion, so we'll be discussing that among ourselves with
24 counsel and proposing a jurisdictional discovery.

25 I just wanted to mention that we think that that

D4GFTERA

1 jurisdictional discovery schedule should be separate from the
2 merits discovery currently underway. In other words, there's
3 no reason to stop the merit discovery while the jurisdictional
4 discovery is underway, so we would just be on two tracks.

5 THE COURT: Well, whether it should be one or two is
6 something we will take up in May. We don't have a date in May.
7 We haven't scheduled out that far.

8 MR. CARTER: We don't, your Honor. I know Mr. Kabat
9 has suggested possibly May 13, 14 or 15.

10 MR. KABAT: We have several dates we'd like to
11 propose; May 13, 14 or 15 or after Memorial Day, May 30th and
12 31.

13 THE COURT: My criminal duty is the week of May 13 so
14 that doesn't work.

15 MR. CARTER: The 30th or 31 they had suggested is okay
16 with us as well.

17 THE COURT: Either of those days is fine at the
18 moment. Shall we say the 30th?

19 MR. CARTER: That's fine, your Honor.

20 THE COURT: At 11, is that when you've been usually
21 doing this?

22 MR. CARTER: It is, your Honor.

23 THE COURT: So May 30th at 11.

24 MR. CARTER: Your Honor, one mild point of
25 clarification based on what Mr. Kabat said. We were discussing

D4GFTERA

1 in the hallway adjusting the schedule for merits discovery as
2 well, so I assume that's an issue we'll take up on May 30.

3 THE COURT: I consider all of that on the table.

4 MR. CARTER: Thank you, your Honor.

5 MR. McMAHON: Your Honor, can you consider pushing
6 that back to 12:00? It's quite an inconvenience for me coming
7 from Washington, D.C. to catch the 8:00 train.

8 THE COURT: Sure. If that's convenient for everybody
9 else, I have no problem with that. Noon it is.

10 I guess that brings us to the application with respect
11 to the plaintiff's privilege log, a healthy portion of which is
12 documents that are subjected to the protective order in Linde
13 v. Arab Bank, which I guess is before Judge Gershon in the
14 Eastern District, is that correct?

15 MR. HAEFELE: That's correct, your Honor.

16 THE COURT: And if the only reason why that's part of
17 the privilege log is that there's a protective order in place.

18 I guess the first question I have is why the two sides
19 should not be making a joint application to Judge Gershon to
20 lift that order to the extent that the materials can be
21 provided for use in this case.

22 MR. COTTREAU: Your Honor, maybe I can just start.

23 Steve Cottreau for Dubai Islamic Bank and I guess my views are
24 in the brief for all the moving defendants. The order, the
25 confidentiality order itself in paragraph 12 sets forth a very

D4GFTERA

1 specific procedure for situations like this where the documents
2 subject to the order, and that order is Exhibit 4 to our
3 opening moving papers --

4 THE COURT: Yes. I'm turning to it now.

5 MR. COTTREAU: It's on page 16, paragraph 12. It sets
6 forth a very specific procedure that the plaintiff should have
7 followed, and that is, within three days of getting the
8 document requests that called for these documents they were
9 supposed to give their bank's counsel notice and then wait
10 until the last day the documents were due to produce them. I
11 understand that that didn't happen, but they've now given -- I
12 don't want to -- there's no recriminations about it, we want
13 the documents, we're happy to get them now. We understand that
14 the plaintiffs from their opposition brief reached out to Arab
15 Bank's counsel who didn't raise any objections save one with
16 respect to one of the documents. It was --

17 THE COURT: Say that again? I'm sorry, I missed the
18 last part.

19 MR. COTTREAU: We understand that plaintiff's counsel
20 from their opposition papers have now reached out to Arab Bank,
21 told them what documents they were withholding. Arab Bank
22 raised only one objection and only with respect to one document
23 and that objection was that one of the documents was obtained
24 by a letter rogatory process and the government that approved
25 the release of that document did so based on the understanding

D4GFTERA

1 that there was this confidentiality order in place, but also if
2 the government had that understanding it would also have the
3 understanding from paragraph 12 that there was a way to get
4 these documents by process or document request, and so we don't
5 even see that being a bar as to the release of that one
6 document. So if anybody should be in here objecting it ought
7 to be Arab Bank. We understand they're not objecting, so we
8 don't see any reason why that document shouldn't be produced to
9 us today.

10 MR. HAEFELE: Your Honor, Robert Haefele from Motley
11 Rice for the plaintiffs. I'm standing principally because it's
12 Motley Rice that's sort of in the crosshairs here.

13 THE COURT: Because you're in the other case?

14 MR. HAEFELE: We're counsel in the Linde case and
15 we're subject to the protective order and the documents that
16 are at issue here are covered under a protective order based on
17 a designation of confidentiality in the Linde case. So we
18 couldn't produce them here, but they are nonetheless responsive
19 to discovery requests here. And we, Motley Rice in particular,
20 feels caught in the crosshairs here between the various
21 obligations here. On the one hand --

22 THE COURT: But you're not opposing their production
23 but for the protective order, correct?

24 MR. HAEFELE: Yes. We made it very clear to counsel
25 in this case as well as to the Arab Bank counsel that our

D4GFTERA

1 purpose for, quote-unquote, opposing the production here is
2 because we need to maintain the confidentiality order and we're
3 not in a position to violate it, the Court's confidentiality
4 order. Arab Bank has the interest in maintaining the
5 document's confidentiality. The plaintiffs have an interest
6 and Motley Rice has an interest in maintaining the integrity of
7 the confidentiality order of the Eastern District of New York.
8 I have in fact, your Honor, provided notice to Arab Bank's
9 counsel and they have -- just to clarify one thing and I'm not
10 in a position where I really want to make Arab Bank's
11 arguments, but I want to clarify one thing that Mr. Cottreau
12 said. I don't think from my discussions with Arab Bank they
13 have made it clear that it's not just that one document that
14 they have a problem with that was not produced, it's the whole
15 set they have, but they were giving that one document that was
16 an example as a particular example that stuck out to them.

17 THE COURT: Is there any reason why -- let me go back
18 a second. You made a determination that among the set of
19 documents that you reviewed in the Linde v. Arab Bank case, the
20 ones that are on the privilege log are relevant ones which are
21 covered by the protective order, correct?

22 MR. HAEFELE: Correct, your Honor.

23 THE COURT: You have no objection to their release.
24 Arab Bank hasn't come in, the defendants, the moving defendants
25 want the documents just to be on the safe side, why shouldn't

D4GFTERA

1 you -- to make it more generic, why shouldn't the plaintiffs
2 and the moving defendants be moving from Judge Gershon to lift
3 the protective order to the extent of allowing the use of the
4 documents in this case, if she sees fit and in that context
5 where Arab Bank is a party it could come in before Judge
6 Gershon and articulate whatever arguments it has as to why the
7 document should not be produced. I understand there's a
8 procedure set forth in the protective order, but just as a belt
9 and suspenders approach, what's wrong with that?

10 MR. HAEFELE: The only concern I have there, your
11 Honor, is I would need to consult with my colleagues in Motley
12 Rice who are closer to that case to determine what our
13 obligations are to our clients and what the concerns would be
14 of doing that relevant to those clients.

15 THE COURT: That's an open case?

16 MR. HAEFELE: It is an open case, your Honor, yes.

17 THE COURT: And what does that case involve?

18 MR. HAEFELE: It involves allegations that Arab Bank,
19 among other things, allegations that Arab Bank had procedures
20 in the Middle East related to helping the families of
21 terrorists and engaging in conduct that encouraged terrorist
22 conduct. That's a very broad description.

23 THE COURT: Your situation in that case is not
24 dissimilar from where you're positioned in this case. I
25 understand your desire to proceed cautiously. Why don't I say

D4GFTERA

1 that within one week you'll send me a letter telling me whether
2 there's from your perspective some problem with the procedure I
3 proposed?

4 MR. HAEFELE: Your Honor, could we get a little bit
5 longer, like ten days? I'm going to be away from my office. I
6 need to discuss it with them.

7 THE COURT: We'll make it two weeks. Okay. So we've
8 dealt with a healthy portion of the privilege log. What are
9 the other complaints about it? Mr. Cottreau?

10 MR. COTTREAU: Your Honor, the other chief complaint
11 that we have about the privilege log is how the plaintiffs have
12 approached the FOIA documents that they've sought and the
13 correspondence that they've had in seeking those documents.
14 There are really three categories of FOIA documents at issue.
15 First, it's the documents, the underlying documents that were
16 produced by the government to plaintiffs. Second, it's the
17 plaintiffs' requests and followup correspondence to the
18 government, and, third, it's the government's correspondence
19 back to plaintiffs.

20 What plaintiffs have done is they've taken sort of a
21 half-waiver approach here if you bought the idea that there was
22 some kind of protection. They've produced the documents -- as
23 we understand it they've produced all the documents they've
24 received from the government that are responsive to any of the
25 document requests.

D4GFTERA

1 THE COURT: Let me pause for a second. That's my
2 understanding, but that's correct, is that right?

3 MR. CARTER: Your Honor one caveat to that. The FOIA
4 productions from government agencies continue. It's sort of
5 like a surprise that arrives on your desk from 2009 and you
6 receive something. I think we may have received a package last
7 week that we have not produced, but with that exception I think
8 that's correct.

9 MR. COTTREAU: We wanted to confirm there is some
10 confusion about it, because they referred in their opposition
11 to all of the responsive evidentiary documents and just wanted
12 to be certain there wasn't anything hidden in the term
13 "evidentiary," it's all the documents you received from the
14 government.

15 MR. CARTER: That's correct, your Honor.

16 MR. COTTREAU: So that leaves us with the remaining
17 two categories of documents. The reason why we're seeking this
18 correspondence between plaintiffs and the government is really
19 six principal reasons, your Honor. One is we don't know where
20 these documents came from. We couldn't authenticate them, we
21 couldn't get originals under the best evidence rule, we
22 couldn't cast doubt on their authenticity without knowing where
23 the plaintiffs got them. By stripping away the cover letter
24 correspondence they now have sort of hidden who the custodian
25 of these documents really is.

D4GFTERA

1 Second, the documents, and you can see this in Exhibit
2 to our reply, were produced with portions redacted often, and
3 so what we'll receive is a portion of the documents redacted,
4 but we've obtained from the plaintiffs because they've produced
5 some of their correspondence with the government, when they
6 correspond with the government the government will explain to
7 the plaintiffs exactly why something was redacted in one of the
8 documents that we have. It will say the name of the officer
9 was omitted pursuant to a privacy protection and they'll cite
10 the rule in 5 U.S.C. 552 that they're relying upon, the FOIA
11 exemption for that information.

12 THE COURT: This is in reply Exhibit 1?

13 MR. COTTREAU: Exhibit 1.

14 THE COURT: Right, I see.

15 MR. COTTREAU: They produced selected correspondence
16 with the government. I'm not sure why they produced this
17 versus other, but we have it, and you can see the important
18 kind of information that's in it, which is the explanation
19 about the redactions and often you can tell whether a redaction
20 is substantive or non-substantive from that correspondence.

21 THE COURT: Well, they don't tell you -- well, I
22 forget whether the documents themselves will have a
23 specification exemption. I assume they don't, right?

24 MR. COTTREAU: I believe some do and some don't, your
25 Honor.

D4GFTERA

1 THE COURT: Okay.

2 MR. COTTREAU: It's mixed. In my experience sometimes
3 those stamps might not be exhaustive.

4 The third reason why we're seeking this information is
5 because there are documents that are withheld, categories of
6 documents withheld, the correspondence with the government,
7 some of the sample correspondence in Exhibit 1 explains that,
8 explains what documents are being withheld. It helps put the
9 documents that we do have from plaintiffs and that they have in
10 context, what's missing, what portions have been omitted of a
11 set of documents.

12 Fourth, the fact that the documents themselves exist
13 or don't exist within a certain agency may aid certain
14 defendants in rebutting some of the allegations by plaintiffs.
15 There are allegations of government meetings, allegations of
16 government communications and the fact that those don't exist,
17 which are revealed in these letters from the government are
18 very relevant to the defense of some of the defendants.

19 Fifth, there are communications and again, Exhibit 1
20 in this selected communications from the government reveals
21 this, there are communications with plaintiffs' fact witnesses.
22 In Exhibit 1 there's references to e-mails that we previously
23 sent to you regarding Richard Newcomb who is the director of
24 OFAC at the time. So we understand omitted from this
25 correspondence from the government to the plaintiffs are

D4GFTERA

1 correspondence itself with witnesses in this case. And so we
2 want, obviously, the documents from the government that would
3 reveal that.

4 And then last, sixth, the whole notion that we would
5 have to go to these government agencies ourselves, make our
6 identical requests, would be a burden on those agencies
7 themselves. There are subdivisions, including subdivisions --

8 THE COURT: Wholly apart from making the same
9 requests, why couldn't you make a FOIA request for their FOIA
10 requests?

11 MR. COTTREAU: We believe we can, your Honor. There
12 is no exemption that applies in 5 U.S.C. 552(b). We believe
13 we're entitled to that. That's the next step obviously and we
14 don't believe the plaintiffs could restrict the government from
15 revealing both the communications they received from plaintiffs
16 and the communications that they made to plaintiffs. In fact,
17 what's fundamentally wrong with their work product argument is
18 work product applies to the documents themselves. Plaintiffs
19 can't restrict the government from releasing them, we don't
20 believe and if they could, that would be an extraordinary
21 proposition.

22 THE COURT: Well, if this weren't in the FOIA context,
23 the selection of documents or categories of documents that the
24 plaintiffs sought to seek arguably it seems to me could be work
25 product. There's a Third Circuit case some of you may be

D4GFTERA

1 familiar with, Sporck v. Peil which I guess is the first in the
2 line of cases taking that view, but here there's been a
3 disclosure to a third party, namely, the United States.

4 MR. COTTREAU: Yes, and a couple of relevant points.

5 Sporck is documents that the government specifically arranged
6 and showed to a witness in a deposition. We're not asking for
7 all documents that you think are relevant or that you believe
8 you're going to use in your case that you received from the
9 government or some way that involves attorney selection. The
10 better analogy is to Rule 34 and to Rule 45. Rule 45 in
11 subsection B specifically requires service on other parties of
12 your subpoena to third parties and indeed if they would have
13 provided instead of by FOIA by Rule 45 indeed we would have had
14 these requests. There should be no different outcome under
15 FOIA than by Rule 45.

16 THE COURT: Okay. Mr. Haefelete?

17 MR. HAEFELE: Thank you, your Honor. First I think
18 there's an asymmetry here that begs to be called to your
19 Honor's attention. The defendants that are principally arguing
20 on behalf of this motion they're defendants who haven't
21 themselves produced most of the basic documents that they're
22 obligated to produce in the course of discovery, even when the
23 Court's issued orders and even when the documents have been
24 shown to exist, and now they come to us and they complain about
25 the margins of discovery here where we have given, plaintiffs

D4GFTERA

1 have given the defendants the substance of the discovery, the
2 essence of the substantive documents, the actual substantive
3 documents that would be admitted at trial. And all of that --

4 THE COURT: I guess I perhaps feel your pain but I'm
5 not sure that's at all relevant to the issue here.

6 MR. HAEFELE: What we're seeking to prevent, your
7 Honor, is the disclosure of plaintiffs' counsel's core work
8 product. The essence of not just Rule 26 which my colleague on
9 the other side has focused on but what is protected under
10 Hickman which is broader than just Rule 26. We think we're
11 protected under Rule 26 because by the terms of Rule 26 what
12 we're seeking to protect here are documents that were prepared
13 by the plaintiffs' counsel or for the plaintiffs' counsel and
14 there are documents that fall directly under Rule 26. But even
15 if they're not directly under Rule 26 what we're seeking to
16 prevent disclosure of is at the core of what's protected in the
17 Hickman case which is the thought processes, the paring down of
18 the documents that are being sought.

19 If you look at the documents that we're seeking to
20 protect, your Honor, the information that's in them that's at
21 the core of the Hickman case is the documents that talk about
22 the dialogue back and forth as to what the plaintiffs' counsel
23 would prioritize in the discovery process. If you can't give
24 us this, then, you know, we would accept this, and no, for
25 instance, another example would be you've told us that you

D4GFTERA

1 don't have these documents but we know XYZ so therefore we're
2 positive that there are documents that fall within this
3 category.

4 THE COURT: Well, let me interrupt you for a second.
5 There are the, I assume the kitchen sink initial requests which
6 are included among the documents in your privilege log, is that
7 correct?

8 MR. HAEFELE: I think they are, yes, your Honor.

9 THE COURT: It seems to me as to those, the theory
10 you're advancing to me now doesn't apply because they are very
11 broad requests without prioritization and presumably without
12 discussion of why you want them.

13 MR. HAEFELE: No, I don't think that's true, your
14 Honor. I think there were very specific requests made within
15 those requests. And so I don't know that the broad category
16 that you're talking about -- I mean, what we may have done is
17 we may have gone through certain documents and culled out what
18 we thought were the most important documents. For example,
19 going through the 9/11 Commission report and focusing on what
20 we thought were the core documents that we would need from the
21 9/11 Commission report in making requests from the various
22 agencies that created those documents for those sorts of
23 things. So that is plaintiffs' lawyers looking at something
24 and using their minds to determine what is important.

25 THE COURT: Let's assume that the day before you

D4GFTERA

1 mailed that letter when it was still sitting on your desk, you
2 or one of your colleagues, it was work product. One of the
3 things that you have to show in order to rely on the work
4 product doctrine is that you didn't make disclosure to somebody
5 in circumstances that rendered it more likely that those
6 documents would be disclosed. And here, unless I'm missing
7 something, if Mr. Cottreau were to submit a FOIA request to the
8 various government agencies saying we want anything that
9 Mr. Haefele sent to you requesting information about 9/11, that
10 probably would be turned over.

11 MR. HAEFELE: Your Honor, I'm not sure that it's that
12 easy. As we ourselves have found, and I propose that others in
13 this room who are lawyers who have made FOIA requests have
14 found, what you get from the discovery process in FOIA is not
15 necessarily a clean document that demonstrates exactly what
16 happened. There are going to be redactions, more likely than
17 not there are going to be redactions, sometimes wholesale
18 redactions, and as I'm sure counsel for DIB knows for certain,
19 there are also processes in place by which the agency that's
20 having the documents sought from will go to the party who has
21 an interest in the documents, presumably in that case to the
22 plaintiffs' lawyers and ask whether or not there is any reason
23 why those documents should not be produced and in this case our
24 argument would be exactly what we're proposing here today, that
25 the core work product of the plaintiffs' lawyers is contained

D4GFTERA

1 within the documents. If there's any production, that has to
2 be redacted out.

3 THE COURT: Is there on either side any case law
4 that's applicable that has not been presented to me in these
5 letters?

6 MR. HAEFELE: I can tell you, your Honor, that there
7 are some cases that were cited in the defense counsel's
8 opposition, or reply brief. At first instance I would say that
9 some of those cases are not exactly as proposed and they're not
10 as on point as we would like them to be or that defense would
11 like them to be, I suppose, and that's the, I think it's the --

12 THE COURT: The Grand Jury? I assume it's not
13 Klamath, which is one of the basic cases In Re: Steinhart?

14 MR. HAEFELE: No, I think it was the Egiazaryam case,
15 I have a case that was cited along with that.

16 THE COURT: Well, in any event you're telling me you
17 want to respond to what they've said.

18 MR. HAEFELE: Well, I think one of the things that I
19 wanted to call to the Court's attention and I wish I could find
20 it in my notes, but in the Egiazaryam case, I think it is. I'm
21 probably butchering the name of the case.

22 THE COURT: The second name is Zalmayev, and madam
23 reporter, the first name which may or may not have been
24 pronounced correctly, is spelled E-g-i-a-z-a-r-y-a-m.

25 MR. HAEFELE: And I would suggest also in the Skanska

D4GFTERA

1 case which was cited along with that. The factual
2 underpinnings of those cases are very different than the cases
3 we have here because the parties that were involved in that,
4 the documents that were related to those parties were third
5 parties that have nothing to do with the litigation. In this
6 instance, the documents being sought are documents to and from
7 the plaintiffs' lawyers which is different from, that's as if
8 you're asking for the substantive documents that we've already
9 agreed to produce. That's what those cases are really more
10 aligned to deal with. I think if you look at those cases
11 what's interesting is that one or more of those cases actually
12 site the Ricoh versus I think it's the Aeroflex case. Within
13 that case --

14 THE COURT: How do you spell Ricoh?

15 MR. HAEFELE: R-i-c-o-h, v. A-e-r-o-f-l-e-x, 219 FRD
16 66 at 70, which the defendants admit in their brief which
17 discusses three e-mails an attorney sent to a third party
18 seeking information to develop the client's case. The Court
19 found that the e-mails were work product because work product,
20 is, quote, intended to preserve a zone of privacy in which a
21 lawyer can prepare and develop lead strategies with an eye
22 towards litigation free from unnecessary intrusions by
23 adversaries. I think that's quoting U.S. v. Adelman, and goes
24 on to say that to the extent that the e-mails reflect counsel's
25 strategy for establishing a claim or defense, they would

D4GFTERA

1 constitute protected attorney work product and that's pretty
2 much what we're arguing here. To the extent that the documents
3 they're seeking to and from the plaintiffs' lawyers reveal the
4 plaintiffs' lawyers' thought processes, they would constitute
5 protected attorney work product.

6 Responding to a few things that Mr. Cottreau did say.
7 Your Honor, I think he articulated the fact or his argument
8 that the documents that he's asking for go to the
9 authentication, without them it's impossible to determine the
10 authentication of the documents, the substantive documents.
11 The problem with that argument is I think in most instances on
12 the very face of the documents it's indicated what the
13 redactions were as well as the reasons for the redactions and
14 they're consistent across all FOIA redactions. And I think
15 they also indicate who it is that was the entity from which the
16 document was generated, so that the document itself indicates
17 who it comes from and it also indicates ordinarily who did the
18 redactions.

19 More so, as Mr. Cottreau has indicated, we have
20 already offered to give them the cover letters and that's the
21 examples he has provided, the cover letters without any thought
22 processes, if there's anything of the thought processes in a
23 document we would redact that. In our negotiations, your
24 Honor, we told them we would give them the substantive
25 documents and we agreed to give them cover letters to the

D4GFTERA

1 extent that they did not reveal attorney work product, that
2 that's something that they did not want. However, some of
3 those documents were in fact produced.

4 In a sense, the key question here is whether
5 respecting the claim of work product privilege is supportive of
6 the adversarial system and the purpose of the work product
7 doctrine as it's enunciated in the Hickman case. That includes
8 both under federal civil procedure Rule 26 as well as the
9 purposes of Hickman which are pretty much to protect that zone
10 of privacy that the lawyers are preparing their case in and
11 preventing the adversary from freeloading or interfering with
12 opposing's counsel preparation of ongoing litigation. That's
13 what we're seeking to protect, your Honor.

14 THE COURT: I understand you view this as consistent
15 with the spirit of work product. I think that the key question
16 and neither side has cases directly on point as to it, is
17 whether disclosure of that thought process to the United States
18 government does or does not render it more likely that third
19 parties such as Mr. Cottreau will learn the contents of the
20 documents. It's an interesting question. It's one I want to
21 spend some time thinking about. I had asked you earlier if you
22 want to submit a further letter discussing the cases raised in
23 the reply brief. You've discussed them orally. I certainly
24 will look at them, but I want to give you the opportunity to
25 submit a further letter if you want to. You shouldn't feel

D4GFTERA

1 obligated to.

2 MR. HAEFELE: We will take that opportunity, your
3 Honor, but I also wanted to, in terms of a case that's more on
4 point. I do think that the In Re: Student Finance Corporation
5 case that we did cite in our brief which among the items that
6 are identified as being within the work product category for
7 the FOIA requests --

8 THE COURT: Okay.

9 MR. HAEFELE: I think that's 2006 U.S. District Lexis
10 86603, November 29, 2006.

11 THE COURT: If I say your letter will be submitted
12 within two weeks also, is that okay?

13 MR. HAEFELE: That's fine, your Honor.

14 MR. COTTREAU: Your Honor, just because I don't want
15 to be deceived in any way, plaintiffs cite two different cases
16 in their brief in support of the notion that FOIA is work
17 product protected. In Re: Student Finance is one. The second
18 is Ron Pallon (ph). I believe both of these cases are out of
19 the Eastern District. Ron Pallon v. Home Indemnity Company.
20 The discussion of the issue is extremely cursory in both cases.
21 Neither one, for example, considers the Rule 34, Rule 45 kind
22 of analogy. Neither one gets much into the language of what
23 type of relationship you need to have with the party that
24 you're disclosing to, or indeed with respect to these documents
25 it's government correspondence in many cases. The notion that

D4GFTERA

1 plaintiffs can convert the government into their work product
2 producing machine, that they can then tell the government and
3 us they can't produce the correspondence is an extraordinary
4 proposition. And I don't think either one of those cases ever
5 comes to grip with that notion. It also doesn't come to grips
6 with the notion that we have in this case which is reflected in
7 these communications, our communications with material fact
8 witnesses that plaintiffs themselves have put on their witness
9 list against us. The notion that plaintiffs can write a
10 letter, send it to a third party witness discussing either that
11 witness's documents or testimony and then put that witness on
12 at trial and have us shielded from that communication with a
13 third party that it has no relationship with --

14 THE COURT: Give me a concrete example of what you're
15 talking about.

16 MR. COTTREAU: Sure. If I was representing an
17 accounting firm and there were bank records and there was going
18 to be a bank that were at issue in a securities fraud case and
19 the bank's a third party to the case, like the U.S. government
20 is here, a third party to this case, and I sent a letter saying
21 hey, here's the kind of documents we're looking for, and they
22 write back and say here's the e-mail to the witness you're
23 going to call at trial, which is exactly what is shown in
24 Exhibit 1 to our reply. Oh, it says we sent an e-mail to
25 Richard Newcomb. You have it, here it is on the topic of the

D4GFTERA

1 documents. They're having communications with third party
2 witnesses in this case that are reflected in some of these
3 communications. We don't have them all because there are over
4 200 documents on their privilege log, but they're having
5 communications with potential witnesses at trial. That also
6 has no work product protection. You need to have some
7 relationship with the party who is generating work product for
8 you or that you're disclosing your work product to in order to,
9 one, qualify for the protection and two, to maintain the
10 protection. These weren't prepared by the governments for
11 plaintiffs as litigants. These were prepared by the government
12 because it was required to under statute, and that's not work
13 product.

14 And disclosure to the government, with all due respect
15 to my colleague that they qualify for some 552(b) exception to
16 the disclosure, they do not. If you take a look at 5 U.S.C.
17 552 and the exceptions in subsection B, they don't qualify for
18 any of them. These would have to be disclosed. We know who
19 the 42 subdivisions of the government are that they sent these
20 to. We could certainly obtain it by FOIA. This is a much more
21 efficient way of doing it. It doesn't reveal much more than
22 what we get through a FOIA request itself. Like the Arab Bank
23 case the approach seems to be here to make us jump through
24 additional hoops when this should have already been taken care
25 of. They want to produce the cover letters because they don't

D4GFTERA

1 think the cover letters qualify for work product protection.
2 Produce the cover letters. I don't understand why you go
3 through the business of putting them on a log and now you'll
4 say they'll produce them. Excuse my frustration but both of
5 these seem to be issues that could have been headed off.

6 THE COURT: Well, there are cover letters that you're
7 willing to produce, which you said Mr. Cottreau didn't want
8 because he wanted all of them.

9 MR. COTTREAU: I didn't want them redacted your Honor,
10 they were going to redact them for things they thought the
11 government was saying that was their work product.

12 THE COURT: But there are cover letters that you're
13 not proposing to redact, is that correct?

14 MR. CARTER: Your Honor, there are cover letters that
15 we would be willing to produce. The essential breakdown in
16 regard to the production of those documents is that we
17 approached the meet and confer as an effort to reach a
18 compromise and when they expressed the concern about the
19 inability to authenticate and the other issues we offered them
20 the cover letters to address that concern in the hopes we could
21 meet in the middle. Ultimately that was rejected and we were
22 told that they wanted everything.

23 THE COURT: Well, if there are ones for which you
24 would not propose to redact on the work product theory that
25 you're espousing, I think those should be turned over. In

D4GFTERA

1 addition to the letter which I've asked Mr. Haefelete for, I
2 would like to be provided in camera with a representative
3 sample of the types of letters that we're talking about. If
4 there's an extensive list of them, I certainly don't want all
5 of them but I guess they may fall into some broad categories
6 and I'd like specimens of those so that I have some sense of
7 what you're talking about and I suppose it would be helpful
8 also to have indicated what you would propose to redact from
9 those various sample specimen letters.

10 MR. CARTER: That's fine, your Honor. That proposal
11 actually addresses an issue I was going to raise. Mr. Cottreau
12 made an example that there were communications with Richard
13 Newcomb who was the head of the Treasury Department, received
14 communications by virtue of being the head of the Treasury
15 department. That was referred. It's not as if there were
16 material conversations about witness testimony, but that would
17 be evident, I think.

18 MR. COTTREAU: Your Honor, one other just quick point
19 because I don't like to be lost, which is that Cozen O'Connor
20 was an adversary of the U.S. government in this process. They
21 sued the U.S. government. The case is cited in our reply
22 brief, but also at Exhibit 4 to our reply brief they filed much
23 of this correspondence publicly and we have a real issue here
24 with selective waiver. They're going to give us the
25 attachments to the correspondence but they're not going to give

D4GFTERA

1 us the correspondence their self. Under Exhibit 1 to our reply
2 brief they're going to give us the favorable, presumably that's
3 why they produced it to us, the favorable correspondence they
4 want to rely on it, but they're not giving correspondence that
5 could put it in context, rebut it. We have a real selective
6 waiver issue here as well.

7 THE COURT: I think the first question is does the
8 work product protection apply. If it doesn't, then I don't
9 have to worry about issues like selective waiver and the like,
10 so I think I need to take this in steps.

11 MR. COTTREAU: Sure.

12 THE COURT: And I understand the concern. I'm not
13 unsympathetic to what Mr. Haefele said with respect to the
14 spirit of work product, I guess it just comes down to whether
15 it meets the requirements of a legitimate work product claim
16 and it's an interesting question that I don't claim to know the
17 answer to at this point.

18 MR. HAEFELE: Your Honor, one final point, though.

19 THE COURT: Yes.

20 MR. HAEFELE: And I don't know that we're at this
21 juncture yet because it sounds like your Honor wants to see
22 more before your Honor makes a decision, but we did want to
23 make it clear that to the extent that, whatever the Court's
24 ruling about production of the FOIA communications or FOIA like
25 communications, plaintiffs ask that they be reciprocal in that

D4GFTERA

1 whatever the plaintiffs were obligated to produce or the
2 categories that plaintiffs are obligated to produce the
3 defendants will be obligated to produce as well.

4 THE COURT: That would follow logically.

5 MR. HAEFELE: Specifically on that, your Honor, we
6 would like to make sure that it is not only the communications
7 relative to each parties' own FOIA or FOIA like request but for
8 example in somebody from DIB interposed one of those objections
9 I talked about earlier with regard to FOIA requests that the
10 plaintiffs have made we would like those revealed as well.
11 They haven't been revealed on a privilege log but we understand
12 those exist. For example plaintiffs make a request for
13 documents to DIB to an agency. The agency then goes to DIB and
14 says these requests have been made. DIB says no, no, no, don't
15 produce those and then we get a response back saying we have
16 nothing to produce. We would like those communications as
17 well.

18 THE COURT: You wouldn't get a response saying we have
19 nothing to produce, you would get a response saying we have
20 concluded that there are responsive documents but that they
21 fall within one of the following exemptions and an explanation
22 of why.

23 MR. HAEFELE: Regardless of the response, your Honor,
24 we would want the communications that DIB or whatever other
25 defendant. I'm just using them as an example.

D4GFTERA

1 THE COURT: Let me deal with the work product issue
2 first. If I determine that the materials have to be turned
3 over, then we'll talk about reciprocity. If I determine that
4 you're correct, I don't have to worry about that, it seems to
5 me. Correct?

6 MR. HAEFELE: I think that's right. I just want to
7 make sure that it's raised, your Honor, that whatever you order
8 is reciprocal.

9 THE COURT: Okay. Well, if I don't treat it in my
10 decision, we'll talk about it after I issue my decision. Okay?

11 MR. COTTREAU: Your Honor, just one last thing on the
12 case law set while you're considering, they cite and rely very
13 heavily on the Plew case, and that case is indicative of a lot
14 of the work product cases that you see. When you have a third
15 party that's producing work product there's some relationship
16 here. The Plew case was a patent infringement case. The suit
17 was against the infringer, which was The Limited or Victoria's
18 Secret in this case. The work product was generated with the
19 supplier or manufacturer of the allegedly infringing article.
20 There's a contractual relationship, they also have a common
21 interest in having the product to be found not to have
22 infringed. That's the typical third party relationship you see
23 in work product space.

24 MR. HAEFELE: Your Honor, if we could respond to that.
25 In this instance, in that instance, first of all, in the Plew

D4GFTERA

1 case, the fact that there was a contractual relationship was
2 mentioned at the very beginning of the case and the rationale
3 of the case it was not even mentioned. I can't tell whether
4 it's part of the rationale or not.

5 THE COURT: As I guess I've made abundantly clear I
6 haven't read any of the cases. I haven't said that expressly
7 but my ignorant questions should have revealed it, except to
8 the extent that I dealt with them in prior FOIA cases, all of
9 this is tabula rasa.

10 MR. HAEFELE: Thank you.

11 MR. COTTREAU: Your Honor, just with a pin cite on
12 that discussion from Plew. We cite the Lexis version, it's at
13 star page 9. When they say the interests are aligned they say
14 the interests of DBA as the supplier to Victoria's Secret the
15 targeted bras are aligned with those of the defendants. That's
16 directly from the Court.

17 THE COURT: I will read the cases as well as Mr.
18 Haefele's additional letter and I will look at the documents
19 and rule as quickly as I can.

20 Anything else we should take up today?

21 MR. HAEFELE: Yes, your Honor. There are some other
22 items that were on the agenda letter. In particular I think
23 items two and three. I think we've covered item one and we've
24 covered item four, but there are items two and three that we
25 would ask your Honor to address.

D4GFTERA

1 THE COURT: For some reach it's not jumping out at me
2 here in your letter. What page are we on?

3 MR. HAEFELE: Your Honor, do you need a copy of the
4 letter?

5 THE COURT: No, I have it. Your March 29 -- maybe I'm
6 looking at the wrong letter. No, that's the wrong letter. Oh,
7 I'm sorry, yes, it's the April 10 letter.

8 Yes. As to Mr. McMahon's documents, it seems clear to
9 me, and I'm only halfway through the stack, that many of them
10 plainly are attorney-client communications. However, the first
11 letter in the pile is a November 27, 2007 letter. Mr. McMahon?

12 MR. McMAHON: Yes, your Honor.

13 THE COURT: And I can't for the life of me determine
14 any reason why that would be considered either attorney-client
15 or work product.

16 MR. McMAHON: Well, your Honor, I think part of the
17 problem was that we had sought an extension with Mr. Carter
18 because we had to collect these documents from different parts
19 of the office, and at the last minute we incorporated certain
20 items and that's one that shouldn't have been in there, and I
21 apologize to the Court.

22 THE COURT: It raises the question of whether it's
23 responsive to any of the myriad requests that the plaintiffs
24 have made over time.

25 MR. McMAHON: I think, your Honor, we went back, my

D4GFTERA

1 associate and I, Oliver Dorell, and I think there is one
2 document that has not been given to the plaintiff and it was a
3 letter that went to the Habib Bank which I'm certain I can
4 provide Mr. Haefele with and provide him with a letter.

5 THE COURT: That's the one I was referring to. I'm
6 only about halfway through the pile but there's a November 27,
7 2007 letter, that's what I've been referring to. So if there's
8 an additional document you're going to send to Mr. Carter, send
9 it to him with a copy of the letter to me so I understand
10 whether it's this document or some other document.

11 MR. McMAHON: Will do, your Honor. Will do.

12 THE COURT: And once I get through the rest of the
13 materials then we can have a further discussion about all of
14 that next month.

15 MR. McMAHON: Will that be a part of the May dialogue,
16 your Honor?

17 THE COURT: Yes.

18 MR. McMAHON: Or is that premature?

19 THE COURT: And then I guess there's a progress report
20 as to it is Al Haramain Oregon documents. Where do we stand on
21 that? Mr. Kabat?

22 MR. KABAT: Yes. We produced over 31,000 pages of
23 documents already which comprise the scans and the materials
24 that were received during the 2004 search and additional
25 documents that were produced to the Grand Jury. I can also

D4GFTERA

1 impart that we received from the federal public defender
2 another 8,790 pages that were produced by another attorney to
3 the Grand Jury, and we plan to produce those on Friday of this
4 week after completing a privilege review. We have also last
5 week received over 26,000 e-mails that were recovered from the
6 Outlook account in PST format. We've completed our privilege
7 review of those e-mails, segregated out the privileged e-mails.
8 Now, we hope to get those produced on Friday, although we may
9 have to do a second production with the Bates stamping as
10 opposed to the PST format. PST format does have the advantage
11 of being more readily searchable than a Bates stamp format, but
12 we would also need the Bates stamp format for depositions and
13 so forth.

14 And finally we have also received the trial exhibit
15 from the prosecution in Oregon of Mr. Sayed on the tax charge
16 and I think there are several hundred exhibits on each side and
17 while we are not authenticating the exhibits by producing them,
18 we will be producing those exhibits and I will note that many
19 of those exhibits were not used at trial and in fact many of
20 them were excluded and inadmissible through the pretrial made
21 in Oregon but we will be producing them nonetheless.

22 So that's where we stand in terms of the production,
23 and I believe I've answered the questions that Mr. Haefele
24 propounded, although I have not yet done the privilege review
25 of the 8,790 pages that we got last Friday.

D4GFTERA

1 THE COURT: Well, just so I'm clear, every document
2 will either be produced or be on the privilege log, correct?

3 MR. KABAT: Yes.

4 MR. HAEFELE: Your Honor, I think that answers the nub
5 of the questions that we had to make sure that every document
6 was covered under the order that came out of the Oregon
7 district court would be represented somewhere either on a log
8 or being produced. As I understand, that's what was just
9 confirmed as a yes.

10 THE COURT: Correct.

11 MR. HAEFELE: The other question we had, your Honor,
12 was whether or not we could get some delineation as to which of
13 the documents were among the seized documents, which were among
14 the Grand Jury documents and there's a third category I think
15 of which documents came from the accountant as well, which
16 presumably would be a smaller set of documents but I think
17 those were sort of the three categories that were referenced in
18 the Oregon's Court's order, which came from the seizure, which
19 from the Grand Jury documents and which came from the
20 accountant.

21 MR. KABAT: I will do a cover letter on the production
22 itemizing the production by sorts.

23 MR. HAEFELE: Thank you, your Honor.

24 THE COURT: So I'll see all of you folks in May.

25 (Adjourned)